

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1332

To be argued by
PAUL B. BERGMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1332

UNITED STATES OF AMERICA,

Appellee,

—against—

ZVONKO BUSIC, JULIENNE, BUSIC, PETAR
MATANIC and FRANE PESUT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS PETAR MATANIC and FRANE PESUT

FORD MARRIN ESPOSITO WITMEYER
& BERGMAN

Cunard Building
25 Broadway

New York, New York 10004
(212) 269-4900

*Attorneys for Defendants-Appellants
Petar Matanic and Frane Pesut*

Of Counsel:

PAUL B. BERGMAN

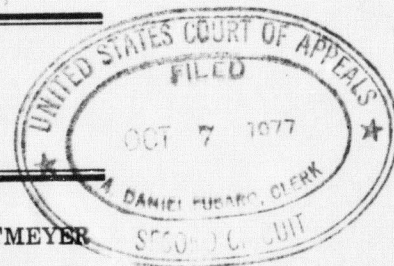


TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE.....	4
1. Basic Facts.....	4
2. The Theory of the Defense.....	5
3. The Period Just Before and Just After the Announcement by Captain Carey.....	9
4. The Witness Dale Hochstetler.....	15
5. The District Court's Treatment of the Defenses.....	20
6. The Witness Thomas A. Davidheiser.....	25
7. The Eyewitness Identifications of Pesut.....	33
8. The Witness John Derdak.....	36
9. The Summations.....	42
ARGUMENT:	
Point I: THE DISTRICT COURT'S UNRELENTING BIAS AND HOSTILITY PERMEATED THE TRIAL FROM START TO FINISH AND DEPRIVED APPELLANTS OF A FAIR TRIAL.....	53
Point II: THE COURT ERRED IN NOT DIRECTING THE GOVERNMENT TO DISCLOSE TO THE DEFENSE THE FBI 302 REPORTS OF THE PASSENGERS.....	61
Point III: THE UNEXPLAINED AND MECHANICAL IMPOSITION OF THIRTY YEAR SENTENCES ON MATANIC AND PESUT WAS UNQUESTION- ABLY ERROR.....	65
CONCLUSION.....	69

TABLE OF AUTHORITIES

CASES:

PAGE

<u>McGee v. United States</u> , 465 F.2d 357 (2d Cir. 1972)....	67, 68
<u>United States v. Bivona</u> , 487 F.2d 443 (2d Cir. 1973)...	56
<u>United States v. Brandt</u> , 196 F.2d 653 (2d Cir. 1952)...	54
<u>United States v. Cuevas</u> , 510 F.2d 848 (2d Cir. 1975)...	54
<u>United States v. DeSisto</u> , 289 F.2d 833 (2d Cir. 1961)..<	54
<u>United States v. Eddings</u> , 478 F.2d 67 (6th Cir. 1973)..<	59, 60
<u>United States v. Fernandez</u> , 480 F.2d 726 (2d Cir. 1973).....	58
<u>United States v. Grunberger</u> , 431 F.2d 1062 (2d Cir. 1970).....	54
<u>United States v. Guglielmini</u> , 384 F.2d 602 (2d Cir. 1967).....	54
<u>United States v. Hartford</u> , 489 F.2d 652 (5th Cir. 1974).....	66
<u>United States v. Hilton</u> , 521 F.2d 164 (2d Cir. 1975) cert. denied, 425 U.S. 939 (1976)	62
<u>United States v. Nazzaro</u> , 472 F.2d 302 (2d Cir. 1973)..<	54, 60
<u>United States v. Schwarz</u> , 500 F.2d 1350 (2d Cir. 1974).	66
<u>United States v. White</u> , 486 F.2d 204 (2d Cir. 1973) cert. denied 415 U.S. 980 (1974).....	56
<u>United States v. Wiley</u> , 278 F.2d 500 (7th Cir. 1960)...	68
<u>Williams v. New York</u> , 337 U.S. 241 (1949).....	66

STATUTES:

18 U.S.C. §4205(a).....	65
18 U.S.C. §4205(b)(1).....	65
49 U.S.C. §1472(1).....	1, 2
49 U.S.C. §1472(i)(1)(A).....	65
Rule 702, Federal Rules of Evidence.....	58

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 77-1332

UNITED STATES OF AMERICA,

Appellee,

-against-

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC and FRANE PESUT,

Defendants-Appellants.

BRIEF FOR APPELLANTS
PETAR MATANIC AND FRANE PESUT

Preliminary Statement

Petar Matanic and Frane Pesut appeal from judgments of conviction entered against them on July 21, 1977 (Bartels, J.) following jury verdicts of guilty on two of three counts of an indictment arising from the hijacking of TWA flight 355 on September 10, 1976. Appellants Matanic and Pesut were each convicted of conspiracy to hijack the plane (Count III, 18 U.S.C. §371) and the actual hijacking (Count II, 49 U.S.C. §1472(i)). Each was sentenced to serve a prison term of 30 years. Matanic and Pesut, however, were acquitted of the first and most serious charge in the indictment, that of air piracy resulting in death

(49 U.S.C. §1472(i)).^{1/}

The trial in this case lasted six weeks with a total of 49 witnesses called by all sides. To the extent permitted by the court, all defendants testified. The jury deliberations began Tuesday afternoon, May 3, and continued through Thursday, May 5, when, near midnight, the jury returned its verdicts.

The central issue on this appeal is whether Matanic and Pesut received a fair trial; whether the bias of the district judge in favor of the government's case and against the defendants' case so intruded upon the jury's deliberations as to call into question its verdict. The court's bias was reflected in every conceivable way -- in the form of its enhancement of the government's witnesses and evidence, its constant derogatory comments to the lawyers for Matanic and Pesut, and its interference with the defense position including its curtailment and belittlement of evidence, outright exclusion of relevant evidence and its unprecedented interference with defense summations. The exclusion of evidence included, inter alia, the court's refusal to allow Pesut to have a language expert, William Derbyshire, testify as to Pesut's inability to speak or understand English and, also, the district judge's refusal to permit the testimony of an eyewitness identification expert, Robert

^{1/}The codefendants Zvonko and Julienne Basic were convicted of all counts and received the mandatory minimum sentence of life imprisonment under Count I. Marc Vlasic, a fifth defendant who pleaded guilty to Count II, received a 30-year prison term.

Buckhout, who would have buttressed Pesut's testimony that he was not present in Grand Central Station on September 8, 1976, two days before the hijacking.^{2/} Error is also claimed with respect to the judge's refusal to direct that the government turn over to the defense the numerous FBI 302 statements obtained from the passengers on the plane. As to the charge, error is claimed (1) with respect to the instruction on circumstantial evidence and the court's refusal to charge that the jury could acquit on the basis of circumstantial evidence; and (2) the court's refusal to charge lesser included crimes. Finally, both Matanic and Pesut urge that there be a remand to the district court for a statement of reasons, if there be any, as to why the sentences they received were disproportionately high in comparison with the sentences received by the Busics.

^{2/}Zvonko Basic admitted that he had placed a bomb in the locker at Grand Central Station the morning of the hijacking (Friday, September 10). Eventually, it exploded during the attempt to dismantle it, killing a police officer, Brian Murray. In its effort to show that Pesut was part of the conspiracy as well as his responsibility for Murray's death, the government presented two eyewitnesses who claimed they had seen Pesut and briefly spoken to him two days earlier on a different level of Grand Central Station.

Statement of the Case

1. Basic Facts

The government's theory of the case was that on September 9, 1976, the five defendants met and finally planned the hijacking at a dinner meeting at the Top of the Park Restaurant in the Gulf and Western Building, located at Columbus Circle in Manhattan. On the following day, each travelled separately to LaGuardia Airport in the late afternoon carrying tickets issued in false names for TWA flight 355 bound from New York to Chicago, Illinois.^{3/} Shortly after the flight actually began,^{4/} Zvonko Basic ("Basic") handed a note to a male flight attendant, Tom Van Dorn, and directed him to bring it to the Captain. The note (Gov't Ex. 6) advised the Captain, Richard Carey, that Basic had hijacked the plane with bombs (T. 1511-1514). Shortly afterwards, Basic arrived in the cockpit laden with what appeared to be sticks of dynamite on his chest and a switch in his hand (T. 1523-1524).^{5/} Although the note to Carey spoke of "we" -- and not simply Basic -- as having hijacked the plane, there was no evidence that either Pesut or Matanic had in any way exercised

^{3/} Zvonko and Julienne Basic, married, carried a ticket in the name of "Mr. & Mrs. Lubin". Matanic's ticket had been issued to "S. Radic", Pesut's to "T. Hoss" and Vlastic's to "J. Marek" (Gov't Exs. 48 through 52). Concededly, these tickets had all been purchased by Basic during the week preceeding the hijacking. (Numbers in parenthesis preceded by "T." refer to pages in the trial transcript).

^{4/} Flight 355 was scheduled to depart at 6:45 P.M. but did not lift off until about an hour later because of ground delays (T. 1503, 1509).

^{5/} Prior to giving the note to Van Dorn, Basic had constructed two fake pot bombs as well as the fake bomb he wore on his chest. This he had done in the plane's lavatory just after takeoff (T. 2946). No firearms, however, were used at any time during the hijacking nor was there evidence that any existed (T. 1679).

control of the passengers in the plane's cabin section prior to Busic's entry into the cockpit,^{6/} as the government claimed (e.g. T. 1385).

Once in the cockpit, with the door shut behind him (T. 1730), Busic confirmed to Carey that, in fact, he was hijacking the plane and that he wanted to fly to Europe (T. 1526). There then ensued a lengthy discussion between Busic and Carey concerning such matters as the plane's fuel capacity, how Busic had managed to get the bombs past the airport security system at the gate, where they were to land next and how many others were involved in the hijacking to which Busic said six (T. 1527-1531).^{7/}

2. The Theory of the Defense

In their openings and in their testimony, Matanic and Pesut clearly set forth the main issues in the case as to them: their defense was that they knew nothing of Busic's plan to hijack the plane; that they had been euchred by Busic into boarding the plane on the pretext that there was to be an important meeting in Chicago concerning Croatian national independence

6/ It appears, however, that Vlastic, who was in the back of the plane, had already told a passenger that the plane had been hijacked or was to be hijacked (T. 1737, 3226-27).

7/ After Busic gained control of the plane, it was flown successively to Montreal, Canada, Gander, Newfoundland, Keflavik, Iceland and finally to Paris, France where, after a wait of over 13 hours, the defendants surrendered. They were then flown back to the United States and were arrested at J.F.K. Airport at about 3 o'clock in the afternoon of the 12th, a Sunday, by FBI agents.

(See generally, T. 1452-68) and that they had been coerced and threatened by Busic who, once he had hijacked the plane by himself, pressed them into service on the threat that if they did not they would die along with the rest of the passengers (e.g. T. 4026-27).

Thrust as they were into this situation, it became crucial to show that their conduct throughout the flight was consistently nonthreatening and, in Matanic's case, wholly solicitous of the passengers.^{8/} And, though the court did not once balk at the government's efforts (largely successful) at painting Vlasic and Busic as heavy handed individuals (T. 1687) who, at times, threatened and bullied the passengers, it never permitted the jury to fairly consider that Matanic's and Pesut's

8/ Six character witnesses were called on Matanic's behalf to show that, despite his large size (see footnote 24, *infra*) he was a gentle person who would be an unlikely participant in a hijacking. (See testimony of Philip Simmons, T. 3790; Wayne Blackett, T. 3792; Marko Vidovic, T. 3794; Thomas Samargi, T. 3798; Josep Sindric, T. 3801; and Father Soldo, a priest at Matanic's church, T. 3804). Although the testimony of these six witnesses took up no more than 15 minutes of the court's time, the judge testily reprimanded counsel just before the last witness, "You're not going to keep this up"... "why do you do this? You can't have a parade..." (T. 3803). Indeed, even though the government saw no reason to question these witnesses, Judge Bartels did. Thus, with two of the witnesses whose ancestry was obvious, Judge Bartels inquired if they were of "Croatian descent" to which they responded that they were (T. 3799, 3801).

conduct was wholly consistent with their defense.^{9/} Moreover, the judge never fairly permitted Matanic and Pesut the opportunity to demonstrate that the relationship Busic had developed with them was one in which Busic, by reason of his position as a leader in the Croatian liberation movement, the surveillance of him by Yugoslavian agents as well as attacks on his person, was

9/ Thus, at the outset with witness Carey, the court commented "I don't see -- well, I'll listen to it. Very well" when counsel for Matanic sought to draw a distinction between Matanic's conduct and Vlastic's (T. 1740). Later, the court remarked, gratuitously in response to a general objection by the government, "Yes, I don't know where we are going" but, in characteristic fashion, overruled the objection and permitted inquiry for a "short time" (T. 1741). The court also refused to allow a witness who was on the plane to state that Matanic was the most compassionate of the male defendants (T. 1892-3; see also, T. 1755-56, 1899-1900). The court's attitude toward evidence of the defendant's good conduct on board the plane was typified by the following colloquy (out of the jury's presence) with counsel for Julienne Busic after his direct examination of one of the passengers, Walter Rush, had barely gotten underway:

[Rudolf]: "...I think I should have an opportunity to explain what her demeanor was on the flight and what other things she did besides the things that Mr. Schlam brought out."

* * *

THE COURT: I know what you are attempting to do. The question is whether you have a legal right to do it.

MR. RUDOLF: Mr. Schlam went into the actions on the plane. And I think...

THE COURT: They were hijackers. That's another matter. (T. 3454-55)

(Pages 3450 through 3458 are incorrectly numbered "3340-3358" in the transcript).

absolutely conducive to the foolish trust that they placed in him (T. 2183-88).^{9a/} The court consistently shrugged off those efforts as irrelevant as if the only purpose of the trial was

9a/ The Court also refused to allow direct evidence concerning Busic's extreme predisposition to secrecy (T. 2812-13, 2825-29). Thus, while Dr. Bernard L. Diamond's testimony (which the court excluded) concerning Busic's abnormal mental state was crucial to Busic's defense (see Point II, Brief for Appellants Zvonko and Julienne Busic), it was also important to Matanic's and Pesut's defense, as shown by the following colloquy with Dr. Diamond:

Q. Doctor, do you have an opinion on the subject of Busic's relationship with the other males who accompanied him on the skyjacking?

A. According to the statement and information provided me by the defendant, the other participants knew nothing of what was expected of them, and what was going to happen. They were asked to participate in this proposal blindly and unknowingly.

They were told, according to Busic, that they must follow his orders implicitly and without inquiring as to any of the details of what was going to happen, or the why's and purposes, other than it was for the purpose of helping the Croatian nationalist movement.

It is my impression that this is a common and prevalent manner of operating under these circumstances.

Q. And giving your views as to Mr. Busic's mental condition, would it have been consistent with your understanding of that condition for him to have kept from the other male defendants the nature of the action in which he was asking them to participate?

A. Yes, I think it was totally consistent. Not only did he fear for the security of the whole procedure and activity, but believing that his life would be terminated in the near future, he felt it best that the full responsibility for everything that happened and was going to happen be upon him, and therefore he informed no one of any details of the whole plan. (Joint App. at 505-06).

to hear evidence which tended to show guilt (e.g., T. 2872 - "I'm permitting all of this although I think its not relevant".)

3. The Period Just Before and
Just After the Announcement
by Captain Carey.

It was a theory of Matanic's and Pesut's defense that, although Busic had lead Captain Carey to believe that other members of his purported "hijack team" had already taken control of the cabin section (T. 1540) that, in fact, was not the case; for, up and until Captain Carey made an announcement to the passengers that the plane had been hijacked -- some twenty minutes after Busic had entered the cabin -- the two other male defendants on trial, Matanic and Pesut, remained in their seats and did nothing to further the hijacking which the government contended they knew about in advance.^{10/}

It was undisputed that at one point, in the beginning of the flight, sometime after Busic had entered the cockpit, Matanic was observed in the front of the plane with his hand thrust in his jacket pocket giving the appearance that he had a gun. Matanic, in fact, testified that he had done that for a short period of time after his first confrontation with Busic

^{10/} Vlasic, who pleaded guilty, had been observed, after takeoff, moving around the back of the plane with the black athletic bag that Busic had carried on board the aircraft (T. 3270, 3280, 1787-88). That was sometime between the time when Van Dorn went to the cockpit with the note and the announcement (T. 3286). Vlasic was a boyhood friend of Busic's. Pesut had a casual acquaintance with Busic and Matanic had first met Busic about six months before (T. 2923, 2914). As between Vlasic, Matanic and Pesut, they were essentially unknown to each other before they met on September 9 at the restaurant; in fact, the first time that Matanic met Pesut was at the restaurant (T. 3858-59).

outside the cockpit door (T. 3898). The crucial question, though, was whether that occurred before the public address announcement by Carey or afterwards. If it occurred before, then it tended to show that Matanic was already aware of Busic's plan to hijack. Conversely, if it occurred after the announcement, then it tended to support Matanic's testimony that he first knew the plane was hijacked when all the other passengers also learned of their circumstance for the first time.

On this score, Captain Carey testified that, during the period of time that Busic was in the cockpit and before the announcement was made, he received no interphone communications from the cabin attendants that there was anything unusual happening in the cabin section (T. 1662-1663, 1720-21) nor, for that matter, did Tom Van Dorn, the attendant who had brought the hijack note, report anything unusual (T. 1694, 1723). In fact, up and until the announcement was made, Carey had no definite recollection of seeing Matanic at all (T. 1729).^{11/} Thus, Busic's statement to Carey that his confederates had taken over the cabin section (T. 1540) was, so far as Captain Carey was concerned, unsupported by anything independently known to him

^{11/} Matanic's seat was in the first class section, near the front. Pesut, however, was seated in the rear of the plane and Carey did not, apparently, see him until much later in the flight (T. 1731). In fact, one of the passengers in the back of the plane did not notice Pesut until the plane had left Gander, Newfoundland (T. 1799-1800). Moreover, Pesut never conversed with Carey who presumed he spoke no English (T. 1732, 1761).

and was, in fact, not so (T. 1730-31, 2950-51), with one exception.^{12/}

In fact, passengers were unable to testify that Matanic did anything at all prior to the announcement (e.g., T. 1909, T. 4029). The best the government was able to muster -- finally, in its rebuttal case, even though the issue was clearly presented in Matanic's opening to the jury (T. 1455) -- was a witness who was sitting in the coach section and who testified that, "at about the time" of the announcement, she saw Matanic and Julienne Busic standing in the first class section. Yet, that witness was uncertain as to whether the curtains separating the first class section from the coach section had even been opened when the announcement was made (T. 4808).^{13/}

A few minutes after the announcement was made, Busic left the cockpit momentarily and beckoned to Matanic. Matanic saw the bomb that adorned Busic's chest. He told Matanic, "Pete, I want you to stay between those two doors." Busic then returned to the cockpit. Matanic returned to his seat but a short while later Busic came out again (T. 3896-97). This time he raised his voice and said to Matanic, "I told you to stay

^{12/} See footnote 10, supra.

^{13/} The announcement was made by Captain Carey after he had changed the direction of the plane to Montreal (T. 1668) and only after a lengthy discussion with Busic (T. 1669, 1727).

here." Matanic rose from his seat and, as he approached, asked Busic what he was doing. Busic responded: "Never mind what I'm doing. I explain to you later. I want you to stand - stay here between those two doors. If you don't want to see a catastrophe, [sic], you'd better stay between those two doors" (T. 3897, 2949). Matanic, who had heard the announcement (T. 3895) testified that he realized that Busic had hijacked the plane and he was afraid for himself and everyone else (T. 3897-3907a). After immediately discarding a "big pencil" in a bag, (this was a tear gas gun which Busic had given to Matanic during their confrontation) Matanic obeyed Busic and stood between the doors at the very front of the plane (T. 3898). After obeying Busic's orders Matanic realized, that whether he wanted to or not, he was part of Busic's hijacking (T. 3906).^{14/} Subsequently, Matanic testified, he walked the length of the plane, but that was after the stop at Newfoundland (T. 3903).

As to Pesut, the record is barren of any incriminating conduct prior to the announcement or prior to the time that he was eventually approached by Busic in the rear of the plane as they were either nearing Montreal or leaving Montreal (T. 2952). Earlier, he had been given one of the pot bombs by Vlasic and told to "hold it carefully"; Vlasic did not tell Pesut what it was. Eventually, after the announcement, Busic came to the back of the plane

^{14/} Before this testimony was elicited, the district judge wryly commented: "Well, it's a little late for him to do much thinking at that area" (T. 3905).

and told Pesut to hold the pot which he told Pesut was a live bomb (T. 2953, 4164).^{15/} And, with the exception of some short intervals of time, Pesut sat riveted in his seat holding that pot bomb as if the slightest movement on his part would detonate it (T. 1934, 4219-20).^{16/} In fact, for some time he went unnoticed altogether by the other passengers (e.g., T. 3228).

15/ This is what Busic said to Pesut:

"...He was -- he was shaking and holding this pot of -- some very unusual way. And he asked me, what is this all about.

And I said, well, Frane, as I told you, we were going to Chicago to this meeting. I didn't mean that. I couldn't explain anything further to you because I didn't trust nobody before we went on the plane. And now I am telling you, we are not going to Chicago. We are not going to proceed to Chicago. We are going on a mission for Croatian national cause. And you have no choice now because you can't go, as nobody else can go off the plane. You -- all you can do best for everybody else and for Croatian cause to remain sitting and hold that pot. It is a bomb, a live bomb. You know me, and nothing can happen at all. There will be no danger whatsoever if you just follow my instructions as you have promised me long before when we were talking about helping some Croatian cause in general." (T. 2953-54)

16/ It was the government's contention that Pesut knew all along (as did Matanic) that the "bombs" on the plane were fake. If the jury believed that, then obviously, their defense of coercion was meaningless. In his effort to show the jury that Pesut truly believed that the pot bomb he held was live, counsel sought to show that Pesut had held the bomb so rigidly throughout the trip that he came back to the United States with a backache. This, of course, was hardly the centerpiece of Pesut's defense, but it was important, if only to show that he reported it to the medical facility at the MCC before, as the government claimed, the defendants had fabricated their defense. This is how the jury heard that evidence:

(Footnote 16 continued on next page)

It was the defense position that Basic had every reason to continue to mislead Matanic and Pesut about the true purpose of the flight up and until the moment that he was certain that he controlled the plane's crew. To tell them earlier would surely risk their abandoning him and thwarting his plan altogether. So, he waited until they -- as every other passenger on the plane -- had no choice but to follow his directions and orders. ^{17/}

16/ (Continued from previous page)

"Q. Did you hold it very tightly?

A. Yes, I did.

THE COURT: Can we accelerate this, please?

Q. Did you have back pain?

MR. SCHLAM: Objection.

THE COURT: Sustained. Oh, I will permit it. Did you have back pains?

THE WITNESS: Yes, it was painful when I came back for about two months.

* * *

Q. Did you report those back pains at the medical facility at the prison?

THE COURT: No, I don't want that. I think you can -- all right, you can ask him if he reported it. Very well. Now you stop there." (T. 4220-21).

Counsel then attempted to introduce in evidence the medical records but the court said "No, no, we don't need any records." (T. 4222)

17/ Basic's unquestioned role as leader was highlighted by Captain Carey: "In fact, he did command everything that the group carried out. Nothing was carried out without his specific charge...he would give his approval or disapproval as he saw fit" (T. 1554; see also T. 1693).

4. The Witness Dale Hochstetler

While there were episodes throughout the trial that demonstrated the court's hostility to the defendant's attorneys and bias in favor of the government, the examination of the government's second witness, a male passenger named Dale Hochstetler, typified the court's bias.

Hochstetler was the last passenger to arrive on the plane and he was vital to the government's case on the issue of venue. He was not only prepared to testify that the hijacking commenced even before the plane left the ground, he also attributed a number of incriminating statements to the defendants. His credibility was sharply contested.

Hochstetler testified that when he got on the plane he headed to the back of the coach section, found an empty seat in the last row, placed his bag on it and headed to the lavatory, where he was confronted by Marc Vlasic who told him to go back to his seat because the plane was being hijacked (T. 1787). He then returned to his seat and sat there for about an hour, while the plane was still on the ground, without making any attempt to get off. (As the evidence was to develop this was plainly a mistake on Hochstetler's part. While the incident undoubtedly occurred, it did not occur until sometime after the plane was airborne [footnote 22, infra]).

Hochstetler was seated when he heard, about one-half hour after takeoff, Captain Carey announce the hijacking (T. 1789). Thereafter, he saw Matanic walking down the aisle with his hand in his pocket "as if he had a handgun in it" (T. 1790a). Later, in Montreal, when 30 passengers were released, Hochstetler claimed that one of the passengers was given a packet of leaflets by Matanic to distribute (T. 1798).^{18/} He also claimed that at one point during the flight, Matanic had explained to him during a "little" conversation that he, Matanic, was not involved in the hijacking "for himself, but he was doing it for the cause" (T. 1803).^{19/} Later on in the flight, Hochstetler saw Matanic with a black bag which, over objection, he was permitted to testify on direct that he "believed" contained dynamite (T. 1811).^{20/} And, at an earlier point he overheard Pesut, in English (as elicited by the court) direct the passengers to close the curtains

^{18/} Matanic denied this and was supported in his testimony by John Gray, the passenger involved, who testified that it was Busic who had given him the packet of leaflets and another passenger, who did not see Matanic in the back of the plane when the passengers were let off in Montreal (T. 3231, 3495).

^{19/} When counsel for Matanic subsequently sought to clarify, through Matanic, what he had meant by this statement, the court refused to permit it (T. 3925).

^{20/} In fact, the black bag contained no dynamite at all. This latitude that the court extended to the government was not extended to the defense. Thus, when Hochstetler was asked a similar question on cross-examination, the government's objection was immediately sustained: "Impressions are not admissible" (T. 1887).

when a French jet passed close by the aircraft (T. 1804).^{21/}

It would be an understatement to say that large chunks of Hochstetler's testimony were inconsistent with his prior statements to an FBI agent, Eugene Connolly, as well as the Assistant United States Attorney. Simply put, his testimony was subject to attack in many areas. Thus, although Hochstetler testified that he told a stewardess, Basia Reeves, about his encounter with Vlasic shortly after it occurred, who told him to not say "anything to anyone", he steadfastly maintained that she did not also say that she was already aware of the problem. (T. 1830, 1848)^{22/} It was not simply, though, a matter of Hochstetler's recollection differing with the facts for, in every statement he had made before trial he had said that Reeves had

^{21/} Hochstetler also recounted the events surrounding two "huddles" called by Busic and Vlasic. These were two incidents which were in marked contrast to the solicitous manner in which all the defendants, particularly Matanic and Julianne Busic, acted toward the passengers. In one case, a huddle followed Busic's frustration at not having received a coded message in Paris which would have signified that his demands for the publication of certain Croatian political tracts had been met (T. 1808). The second occurred when Matanic took a sick passenger off the plane and lasted for a short while (T. 1813). There was a third time the passengers were grouped together but that only preceded the announcement by Busic that there was to be a surrender (T. 1817). Just prior to the first huddle, a priest on board the plane took it upon himself to deliver the last rites to the passenger over the public address system. Judge Bartels, in questioning Hochstetler, then brought out in a series of leading questions that "there was a lot of crying then and sobbing and prayers." (T. 1819-20). He thereafter had Hochstetler once again recount the huddles (T. 1820-21).

^{22/} Of course, Ms. Reeves was by then well aware of Vlasic, the man with the bag, and had told this to Mr. Hochstetler (T. 3266). The entire incident occurred after the plane was in flight (T. 3268).

known about the man with the bombs in the bag. He told it to agent Connelly when he arrived in Chicago from France (T. 3194) and to the Assistant U.S. Attorney shortly before his testimony (T. 2663-64). But, at the trial, he inexplicably lost all recall of his full conversation with Ms. Reeves.

Hochstetler also could "not recall" that he had told Agent Connelly that Vlasic was upset because Matanic had not returned to the plane when, while in Paris, he had removed a sick passenger through the back door (T. 3197), or that Matanic was clearly angry with Vlasic when Vlasic forced the passengers to stand in the middle of the aircraft (T. 3198), or that Matanic had told him "I don't want to die and I don't want anybody else to die or get hurt and we should be able to resolve all our difficulties without the violence" (T. 3198), and that "the reason Vlasic was nervous while Matanic was out of the plane was because he spoke fluent French and the group was probably afraid of losing him" (T. 3200).

Despite the serious issue of Hochstetler's credibility, the court persistently came to Hochstetler's rescue to the detriment of Matanic, Pesut and all the defendants. Thus, it was the court that brought out twice that Hochstetler had not slept before the FBI interview even though Hochstetler had already said it (T. 1834). It was also the court that remarked that Hochstetler's

statements to the FBI were simply not "remembered" by him (T. 1897), that Hochstetler was not "denying" what he said to the FBI agent (T. 1944) and further, in the jury's presence, that the "real essence of the case" was what Hochstetler remembered while on the stand (T. 1894). ^{22a/} Thus, any chance that Hochstetler would

22a/Hochstetler, apparently not a teetotaler, testified that he set two "records" that weekend, one of which was that it was the longest time he had been "without a drink" (T. 1848). He denied that he had consumed any liquor given to him by Matanic during the flight (T. 1848). Matanic, however, testified that he saw Hochstetler drink about 8 to 10 of the small bottles of liquor customarily served on airplanes (T. 3913-16). There had been a picture taken (Defendant's Ex. F), however, shortly after the passengers were released, showing Matanic, Hochstetler and a third male passenger with their arms around each other, smiling. This photograph showed Matanic holding an apparently empty bottle of "J & B" scotch. There was a second picture, also, which showed Pesut and Matanic with the same members of the crew and again, everyone was smiling (Defendant's Ex. H). Both photos were obviously taken alongside the plane. Originally, those photographs were offered in evidence during the cross examination of Carey to show the friendliness which existed between Matanic and Pesut with the passengers and the crew, and hence, it bore on the issue of intent (T. 1749). The court, however, refused to admit them because, as the court stated: "You just can't do it, it is unfair just to take a picture at a moment when all are happy together and at other times when people were not happy. Moreover, it is after the events" (T. 1750). Earlier, during the offer, the court surmised that they might have been taken "two days afterwards" following a "fling" in Paris, and that would explain why "they are all happy". "The pictures might be very misleading." (T. 1749) But the court further refused to allow in evidence the picture of Hochstetler during the cross examination of Hochstetler, even though Hochstetler denied that he drank liquor on the plane (T. 1862). The court also refused to admit it during the examination of Basia Reeves, the stewardess who took it and who could have dispelled any doubt that it was taken after a "fling" in Paris, but was taken just after the surrender (T. 3278). (See also, T. 3879-83, 3926-34). Thus, even though there was evidence tending to support Matanic's testimony that Hochstetler was quite possibly drunk a good part of the flight, the court refused to admit it. Notwithstanding that, the court did permit government counsel to tell the jury during his summation that Matanic claimed Hochstetler was a "drunkard" (T. 5438); of course, Hockstetler may very well have been drunk but the court never permitted the jury to see evidence strongly corroborating Matanic's testimony on that score.

finally back down under the pressure of cross-examination based on Connelly's report was effectively removed by the court; that is, that Hochstetler was not "denying" anything, he simply didn't "remember" (T. 1943-44). Finally, it was the court that sharply reprimanded counsel for Matanic when, caught in a contradiction in his testimony, Hochstetler testified that he had fully reviewed Agent Connelly's 302 report when he was interviewed by the Assistant U.S. Attorney, although he had earlier testified that he had never fully reviewed the report.^{23/}

5. The District Court's Treatment
of the Defenses.

The idea of hijacking a plane to publicize the cause of Croatian independence appears to have occurred to Basic as early as January, 1976 (T. 2887). In choosing those who would accompany him, one of the criteria (as elicited on cross-examination by the government) that Basic employed was that "I would have to choose people who trusted me one hundred percent and who would not want to discover everything before it really happens"

23/ This was the colloquy:

"Q. I thought the first time you reviewed it fully was this morning in court.

MR. SCHLAM: I object to that.

THE COURT: Sustained.

MR. BERGMAN: I haven't got the transcript.

THE COURT: Then you'd better just -- just don't make statements like that unless you know what you are talking about.

MR. BERGMAN: Well, the transcript will bear me out or not." (T. 1949-50)

(Footnote continued on next page)

(T. 2988). In the case of Pesut, Busic's task was uncomplicated. Pesut, a somewhat dull individual, had already helped Busic in the distribution of some political handbills (T. 2924, 4059). Thus, on Wednesday the 8th, two days before the hijacking, Busic simply asked Pesut if he would be willing to go with him to Chicago that following weekend to attend a sensitive meeting where leaflets would be distributed (T. 4068-4072). Busic, about a month earlier, had told Pesut that there might be such a meeting (T. 2979-2980, 4064).

Matanic, however, was inactive politically. He had heard Busic speak on several occasions but, prior to March 1976, he had never met Busic. Matanic, who had been a star player on the Croatian Soccer team of the German-American Soccer League and who was then the team's coach, had never been involved in the movement for Croatian independence.^{24/} But one evening in March, 1976, Matanic was seated in a restaurant in Astoria, Queens. Busic, at a nearby table, overheard Matanic speaking about his father who had been killed by Serbians. Thereafter, Busic happened across Matanic on several occasions, and each time he further indoctrinated

23/ (Continued from previous page)

In fact, earlier that very day, Hochstetler testified that, although the assistant had shown him Connelly's 302 report, he had just "leafed through it. I didn't digest it." (T. 1894-95).

24/ Matanic is powerfully built; he is about six feet three inches tall and weighs over 225 pounds. It is not surprising, therefore, that when Busic purchased the airline ticket that was to be given to Matanic, he chose the first class section and thereafter positioned Matanic to guard the entrance to the cockpit.

Matanic in the cause for Croatian independence. He also impressed upon Matanic the need for absolute secrecy as well as the requirement that, if Matanic was a true believer in the cause, he would have to trust Busic completely. Apparently, when Busic was satisfied that Matanic could be trusted, he told him about the meeting in Chicago and asked Matanic if he cared to go. Matanic said he would (T. 2913-2922; 2965-2976).

In preparation for their weekend trip to Chicago, Matanic and Pesut each packed what one would customarily take on a weekend trip (T. 3886, 4154). Pesut even purchased a new suit with accessories (T. 4076). They took no weapons nor any other device to further an airplane hijacking. The court, however, belittled this evidence, saying that "we don't want every tiny little detail" (T. 3874; see also, 4014-17).

Moreover, both Pesut and Matanic sought to elicit testimony showing that in the week before the hijacking they did nothing which would show that they were part of the conspiracy which was alleged in the indictment to have begun on or about September 6.^{25/} That effort, however, was met with the court's obvious hostility and displeasure. Thus to show that Matanic was out of town the weekend before the hijacking and could not possibly have had contact with Busic, counsel sought to introduce in evidence a postcard that Matanic had sent to

25/ See testimony of Serb Reljevic, Matanic's girlfriend (T. 3807-3813) and testimony of Mr. "X", Pesut's employer (T. 4195-4204).

his girlfriend from Toronto, Canada. Government counsel objected: "Your Honor, what possible relevancy..." The court responded: "None. None. It will not be admitted in evidence. Let's waste no time." When defense counsel asked to be heard, the court responded "Never. Proceed." (T. 3841). Thereafter, when defense counsel sought to have Matanic recount to the jury what he had done during the very same week of the hijacking, the court, although begrudgingly permitting the evidence, said in the jury's presence: "It doesn't sound relevant to me." (T. 3842); "I don't think it's important." (T. 3843). Thereafter, the court virtually took over the questioning and proceeded in a "let's get this over with" manner (T. 3842-3847), a routine which even government counsel comfortably joined with the court's approval (T. 3847).

But the court's belittling and curtailment of the defense case was not limited only to matters going to a defense of alibi.

It was central to both Matanic's and Pesut's defense to show the jury that their relationship with Busic was such that, not only did they trust him but, that by reason of their belief in the need for secrecy in matters involving Croatian independence, they reasonably accepted such things as Busic's secretiveness, the false names on their airplane tickets and the manner in which Busic had directed that they come to the

airport. Moreover, in terms of their defense of coercion, it was equally important to show that, from what they knew of Busic, he was a deadly serious person whose personal commitment to Croatian independence extended as far as suicide. But the court effectively limited the inquiry of Matanic along those lines and indicated that such matters were irrelevant to the issues of the case (e.g., T. 2965, 2968 - 69, 2970, 3829-34, 3837).

Busic, in his testimony, had related that he had seen Matanic on several occasions in the months before the hijacking and they spoke generally about Croatian matters and Busic's political beliefs. However, when counsel for Busic attempted to elicit what specifically had been said on those occasions, the court chilled the inquiry so that counsel was able to elicit only that Busic had spoken with Matanic once in March, April, June and August (T. 2914-2922) and the bare minimum of what they had spoken about. The court, however, only seemed interested in hearing about the discussions they had concerning the hijacking of which there were none. So, when Busic began to recount a discussion he had with Matanic in June about Yugoslav secret police activities outside of Yugoslavia, Judge Bartels cut in: "No, no, no." (T. 2917) Similarly, when counsel for Matanic attempted to elicit from Busic what he had said to Matanic concerning the false name on the ticket, the court rejected it and

supplied, itself, what it supposed the answer would be (T. 2965). Thereafter, the court treated the questions by Matanic's counsel as calling for "hearsay", even though they only called for Busic to relate what he said to Matanic (T. 2967) and as a waste of time (T. 2969-70): "Well, we let so much hearsay in that I don't mind letting this in. I am not going too far with irrelevancy, however." (T. 2970).

6. The Witness Thomas A. Davidheiser

The government's case against Matanic depended in large part upon the post arrest statements attributed to him by an FBI agent, Thomas A. Davidheiser.^{26/}

Davidheiser testified that he had participated in the arrest of Matanic when he was returned to the United States on Sunday, the 12th. Matanic was immediately taken to FBI Headquarters in Manhattan and interrogated by Davidheiser for about two hours (T. 4330-34). According to Davidheiser, Matanic said that the plan to hijack the aircraft was "laid out" by Busic when all the defendants, including Vlasic, met for dinner at the Top of the Park Restaurant the night before Busic hijacked the plane. The crux of Davidheiser's testimony is contained in the following excerpt from the transcript:

26/ The jury, in its deliberations, requested that the testimony of Davidheiser be read back (T. 5906).

"The plan, as Matanic pointed out, that Busic revealed to the group was that the group would all travel to LaGuardia Airport separately on Friday evening.

The flight was supposed to leave somewhere in the area of 5 or 6 o'clock, somewhere along that time.

They would all remain separate in the boarding area. They wouldn't talk to each other, and once boarded the plane they would remain separated, seated apart from each other.

At some time after the plane was in the air, it would be expected that a message would be given out over the loudspeaker system from the captain of the aircraft to the effect that the aircraft had been hijacked.

Matanic told us that Busic at this meeting told Matanic it was his role at that point to rise from his seat from the forward part of the plane with his hand in his coat pocket, to look menacing, as if he had a gun in his pocket.

Busic told this meeting the means the plane would be hijacked was that a note would be passed from Busic to the captain stating that bombs were on board.

Matanic told us that at the meeting at the Top of the Park Restaurant Busic told him that fake bombs would be carried on board the aircraft, but that only, of course, the members of the group would know they were fake bombs."
(T. 4337-4338)

Davidheiser also testified that Matanic had never told him that he had been tricked by Busic or that he thought he was going to Chicago (T. 4340). He also testified that Matanic never requested a lawyer in his presence (T. 4358).

Because it was obvious that the government, which had not called Davidheiser in its direct case, was keeping him

in the wings as a rebuttal witness, counsel for Matanic sought to deal with Matanic's FBI post-arrest statements while Matanic was testifying. Matanic's weariness had already been elicited as well as his request for an attorney shortly after he was placed in the FBI car (T. 3938-44). Moreover, he had refused, once at FBI headquarters, to sign the waiver of rights form which, among other things, included a recitation of his right to an attorney (T. 3945; Defendant's Ex. CH).

Matanic had consistently maintained that he had asked for a lawyer but none was given to him. Crucial to that position was the undisputed fact that when he was interviewed by Robert Tanenbaum, an Assistant District Attorney from Manhattan, in Davidheiser's presence immediately after Davidheiser's interrogation, he had again asked for an attorney but, once again, was totally ignored.^{27/}

27/

This was the portion of the recorded Tanenbaum interview as read to Davidheiser:

"Q. If you do not have a lawyer or cannot afford a lawyer, a lawyer will be provided for you now, free of charge, before any questioning. Do you understand.

A. Yes, but I would like to ask you, may I think another day and get myself a lawyer what I want. I would like to have some lawyer like my lawyer."

"A. In other words nobody to give me a lawyer, that I would like to have my lawyer that I can pick out.

Q. Having now been advised of your rights would you like to tell us what happened, give us your version of what happened, without a lawyer being present now?"

(footnote continued on next page)

But when counsel for Matanic attempted to elicit the events of the Davidheiser and Tanenbaum interviews on direct, the district judge prevented it altogether, giving the government the first crack at that episode (T. 3948). Indeed, just before that ruling, when counsel sought to develop the events of the FBI interview, Judge Bartels cut it off: "No, I think that this is what you call anticipatory rebuttal. At the present time, I think without more, it is irrelevant. It is a defusing operation, I suppose" (T. 3947). Although the court immediately recognized the obvious bias in its statement and tempered its language (T. 3947-48), the jury already knew that the judge considered the whole matter irrelevant.

Shortly afterward, when counsel had finished Matanic's direct examination, the judge had second thoughts concerning its ruling and allowed counsel to ask "two or three questions" (T. 3949).^{28/} But even then, when counsel started to ask Davidheiser

27/ (footnote continued from previous page)

"Q. Okay. So you are willing to tell us the truth about what happened, starting on September 10th, last Friday, without a lawyer being here now, is that correct?" (T. 4357-58, 4364)

28/ Counsel's questions were few and brief, as directed by the court. Nevertheless, when on redirect examination counsel finally should have had the opportunity to question Matanic fully about the Davidheiser interview, Judge Bartels immediately chilled the examination, giving the jury the impression that whatever was to follow had already been heard, when, in fact, it had not. Thus, the court stated: "Now, you see, I permitted that on direct examination, so we pass over that phase. We don't want to repeat it again, do we?" (T. 4019). Matanic was given the worst of both possible worlds.

about the Tanenbaum interview, Judge Bartels gratuitously interjected, as if the point were significant, that Tanenbaum was "not a Federal prosecutor of the U.S. government, is that right?"^{29/} (T. 3950).

In seeking to discredit Matanic's testimony, government counsel sought to show the jury that it had been manufactured by Matanic who, in the weeks and months following his arrest, had concocted it along with Busic, the basic aim being that Busic would take full responsibility and exonerate Matanic as well as the others (T. 3954-61). But the undisputed fact had been that Matanic, although he had "seen" (a fact dwelled upon by the government [T.3954-56]) Busic during the week following his arrest, had not had the opportunity to speak with him because they were segregated at the MCC. The first time that he spoke with him was on Friday, September 17, when the two of them met on the prison's roof. At that time, Matanic told Busic that he had not told the FBI that Busic had tricked him and thereby, in Matanic's words, betraying "you or Croatian cause" (T. 4024). Busic responded by telling Matanic that he had already told the Manhattan District Attorney -- two or three days before -- that he had, in fact, tricked him (T. 4025; See Joint App. at 56 for copy of Busic interrogation of September 14, 1976).

Davidheiser's credibility was sharply attacked; nevertheless, such inroads as may have been made on behalf of Matanic

^{29/} The court had already made this point -- gratuitously again -- during Matanic's redirect examination (T. 4021-22).

were quickly undone by the court's constant rehabilitation of Davidheiser and belittling of the defense cross-examination.

The fact that Matanic had refused to sign the waiver of rights form after he had been read his Miranda rights bore heavily on his testimony that he had asked Davidheiser for a lawyer. On direct, the government avoided the fact that Matanic had not signed the waiver form and concentrated on his understanding of his rights (T. 4334). It had already been established through Davidheiser (and Matanic himself agreed [T. 3943]) that Matanic understood his rights. Nevertheless, when counsel sought to learn whether Davidheiser saw a difference between Matanic's understanding his rights and then waiving those rights, a crucial distinction in view of Matanic's claim that he had asked Davidheiser for a lawyer, the court wrongfully deflated the distinction: "I don't know what you are talking about. If you understand the question, answer it." (T. 4352). Of course, Davidheiser acknowledged that there was a difference but the point had already been lost on the jury.

Davidheiser was also cross-examined at length concerning the Tanenbaum interview and Matanic's request for a lawyer at that time (T. 4356-59, 4362-65). Davidheiser, however, did not view the request as a present one but only as an expression of concern by Matanic that not just any lawyer be "thrust upon him" (T. 4358). This "impression" of Davidheiser's was, of course, not that of Tanenbaum who, after ignoring Matanic's statements altogether plugged on and twice asked Matanic if he was willing to answer questions "without a lawyer present now" and "without a lawyer being here now" (T. 4364). But the use of all this to Matanic was severely undercut

by the court when, for the third time during the trial, it belittled that evidence. Thus, the court interrupted the cross-examination and without any hint of confusion in the time sequence of the Davidheiser and Tanenbaum interrogations, reminded the jury not only that Davidheiser's interview had been completed when Tanenbaum's began, but further implied to the jury that whatever may have happened at the Tanenbaum interview was of no interest to Davidheiser and, therefore, of no interest to the jury. ^{30/}

The court also came to Davidheiser's aid when, after Davidheiser testified that he had destroyed his handwritten notes of his interview with Matanic, he was asked if, while listening to Matanic speak he "edited" what he wrote down. Although the question

30/

THE COURT: Let me ask one question so we get the jury to understand.

Had your questioning of Mr. Matanic been through, over with when Tanenbaum from the District Attorney's Office came in?

THE WITNESS: Yes, it was concluded at that point, sir.

THE COURT: Concluded completely?

THE WITNESS: Yes

MR. BERGMAN: Thank you, I neglected to ask --

THE COURT: Were you interested in Mr. Tanenbaum's examination of Mr. Matanic?

THE WITNESS: Mr. Matanic was in my custody. I had to be there with him.

THE COURT: You had to be there because he was in your custody but your examination of Mr. Matanic was through?

THE WITNESS: Yes it was, sir. (T. 4363)

was wholly innocuous, the court sustained an objection to the word "edited". But the court went further and fulfilled the function of an adversary when it asked "Did you write down the substance of what he said" and "You don't have any trouble with your hearing, do you?" (T. 4380-81). Davidheiser responded to these questions as would be expected.

Davidheiser was subsequently asked if his final written 302 report was "an edited version" of his destroyed handwritten notes. Even in that context the court saw fit to chastise defense counsel who then offered to ask the witness what his understanding of "edited" was; but that effort was similarly cut short. Counsel then started from square one and asked Davidheiser if he had copied his rough notes verbatim. Instead of the witness answering the question, the court did: "No. I can answer that" and, then, in strident tones told counsel in the jury's presence that counsel knew the answer as well (T. 4382-83). Once again, the court had utterly belittled a legitimate line of inquiry and showed its hostility to defense counsel.

The court's questioning also bolstered Davidheiser's credibility when Davidheiser was questioned as to whether he had, in view of his opinion that Matanic was fluent in the English language, incorporated any quotes from Matanic (he had not). The judge interjected, "He doesn't have to in his report quote verbatim statements. If that's your inference, I don't think there's any requirement of that at all" (T. 4392). Of course, the fact that there is no such "requirement" (which was hardly the point of the inquiry, anyway) could easily have been brought out by government

counsel and not the court. (See also, T. 5647).

7. The Eyewitness Identifications of Pesut

Two witnesses for the government, Charles Gore and George Bracaglia placed Pesut at Grand Central Station in the early morning hours of September 8 - two days before the hijacking. While the most damaging impact of their testimony was to connect Pesut with the live bomb that Basic placed in the locker at Grand Central Station, it is clear that the jury, though rejecting their testimony for the purposes of Count I in the indictment, could have relied upon it in reaching its guilty verdict as to Pesut on the conspiracy count (Count III) as well as the hijacking count in Count II.

In the sometimes classic mold of eyewitnesses, Gore and Bracaglia were both quite certain of their identification (T. 2340, 2386). Both worked at O'Henry's Film Works, a store located in Grand Central Station, opposite a bank of lockers. The store was located on a completely different level of the complex than was selected by Basic when he placed the bomb (T. 5941). In any event, the sum and substance of their testimony was that at about 1:00 A.M. on the 8th, they were locking up the store when a man approached them from the lockers opposite their store. He spoke with a foreign accent and, in broken English, inquired if the lockers were secure and what time the station closed (T. 2377).

Five days later, Monday the 13th, Bracaglia saw Pesut's picture in the New York Post, showed it to Gore and both agreed that it was the same man they had seen the week before (T. 2378). (Matanic's and Vlastic's pictures were on the same page [T. 4329]). They reported

it to the police whereupon they were shown a photospread of the five defendants (T. 2380). Again, they agreed that Pesut was the man they had spoken to (T. 2330-31, 2381)^{31/} and at the trial they were sure in their testimony that it was him (T. 2341, 2386).^{32/}

Pesut testified that he has never been in Grand Central Station (T. 4216-18). To support his testimony and rebut the testimony of the two eyewitnesses, Pesut sought to have the jury hear the testimony of Dr. Robert Buckhout, a professor of psychology at Brooklyn College. Buckhout had been qualified as an expert witness on the reliability of eyewitnesses identification on previous occasions (T. 4098) and was being called by Pesut. Prior to his appearance in court, Buckhout had reviewed the photospread

^{31/}

At side bar, the district judge suggested to the assistant that he should ask Gore if the detective had suggested to Gore which picture to select. Counsel objected to the court's suggesting a question to government counsel. The court overruled the objection (T. 2332).

^{32/}

As part of his defense, Pesut called Detective John Begley of the New York City Police Department. Begley had interviewed Gore and Bracaglia on September 21, 1976, and was told by them that the man they saw was 5'7" tall (T. 4038). Begley was a defense witness because Bracaglia had maintained that he had told Begley the man was about 5'9" or 5'10" (T. 2409). The brief cross-examination by the assistant was then followed by an inquiry of the court similar to its inquiries concerning the Tanenbaum interrogation of Matanic:

"THE COURT: Where did you interview them on September 21st?

THE WITNESS: Manhattan District Attorney's Office.

THE COURT: That's what I thought. Thank you very much."
(T. 4040)

So much, therefore, for Detective Begley's testimony.

which had been shown to Gore and Bracaglia, the New York Post photo of Pesut, and was also aware of the disparity in height descriptions given by Bracaglia (T. 4099-4100).^{33/}

Based upon his studies, Buckhout had isolated a number of significant factors to be considered in gauging the reliability of a claimed identification. These included fatigue, (T. 4105-06) the length of time of the observation which, Buckhout noted, tends to be exaggerated (T. 4103-04), the insignificance of the event, which tends to lessen reliability (T. 4101), the length of time reporting the observation from the identification (T. 4106),^{34/} and the tendency of witnesses who rehearse to add detail based on sources other than the event (T. 4107). Buckhout, himself, best characterized the purpose of his findings:

"The purpose usually, in bringing the questions out, for me, would be to provide some of the research findings so the jury could make a decision in the light of those findings, recognizing they will also know more about the case than the psychologist will."
(T. 4109)

Buckhout also would have illuminated to the jury the reasons why an initial identification based upon a newspaper photograph ought to be followed by an unbiased spread of photographs (T. 4119-20). Moreover, there are difficulties in "conformity", that is, the danger that one of two witnesses to an event will suggest his recollection to the other who will adopt it without an independent

^{33/} Bracaglia and Gore had just finished a full shift when they were locking up the store; Gore had worked a regular eight hour shift (T. 2320) and Bracaglia had been working 12 hours straight (T. 2373).

^{34/} There is a dramatic drop in accuracy during the first 24 hours (T. 4106-07).

foundation (T. 4124-25). Finally, based upon testing, Buckhout pointed out that the degree of confidence expressed by an eyewitness in his identification bore no relationship to the correctness of the identification (T. 4130-31).

Following argument of counsel, the court dictated its already prepared decision into the record, for the reason among others, that Gore and Bracaglia were not confused or uncertain in their testimony (T. 4149). The court further found that "... this is not the kind of case where such expert testimony is going to be helpful to the trier of the facts because of the manner in which the identification was triggered and the complete neutrality of both the witnesses" (T. 4150). The court also believed that the testimony of Buckhout would be prejudicial and misleading to the jury. (*id*)

8. The Witness John Derdak

As with Matanic, the government's case against Pesut depended in large part upon the credibility the jury would attach to John Derdak, the FBI agent who interrogated Pesut and claimed that Pesut had confessed. ^{34a/}

John Derdak spoke and understood what he styled as the Serbo-Croatian language and used a Serbo-Croatian/English dictionary several times during the course of his interrogation of Pesut (T. 4428, 4541-42, 4460). Although the defense position was that Pesut spoke only one of the three Croatian dialects and certainly not "Serbo-Croatian",

^{34a/} The examination of Agent Paul Marum, the agent who arrested Pesut and who was present while Derdak interrogated him, was also replete with the court's interruptions and showing of bias (e.g., see T. 4422, 4423, 4430, 4432, 4439-40, 4445-46).

Derdak maintained that the languages, even though they were written in entirely different alphabets, were "basically" one language (T. 4461) and that he had no difficulty in communication with Pesut (T. 4481, 4503) even though he did not know which of the three Croatian dialects Pesut spoke (T. 4501).

According to Derdak, Pesut confessed to having knowingly and voluntarily participated in the hijacking.^{35/} Derdak testified that Pesut had told him that he, Pesut, had been told by Basic on Wednesday afternoon, the 8th, that "the hijacking was on" (T. 4472) and thereafter, he made preparations for the event (T. 4473). On Friday, Pesut left his apartment in New Jersey and went by car to LaGuardia Airport (T. 4474-75). Once at the airport, he saw the other defendants and Basic standing apart from one another. After he was seated on the plane he was told by Ms. Basic that Vlasic would bring him "something". Thereafter, Vlasic gave him a metal box, told him it was a fake bomb and to hold it (T. 4477-79).^{36/}

^{35/} Curiously, although Derdak had questioned Pesut for several hours and although the government's position as to Pesut was that he had been eager to speak ("I want to tell you what happened" [T. 4423]), Pesut had nothing to say to Derdak about the dinner at the Top of the Park Restaurant (T. 4534).

^{36/} The district court constantly enhanced Derdak's credibility. Thus, after the court overruled defense counsel's challenge to Derdak's qualifications as an interpreter as elicited by the government, the court on its own established that Derdak had interpreted on "several" occasions before. Not satisfied, apparently, with "several", the court asked "only several times?" to which the witness predictably responded "many times" (T. 4468). Finally, to impress the point even further, the court asked if these other individuals spoke "differently" than Pesut; and Derdak rather than saying simply "no", volunteered (as was his custom) that "They all speak the same. They all have little variations, but you understand them. They understand me and I understand them" (id). All this was done against what the court

Pesut himself testified (through an interpreter) that he spoke some English, but not much (T. 4218). As to Derdak, Pesut did not understand all of his questions and, because he had to repeat his answers many times, it appeared to Pesut that Derdak, who used a dictionary, did not understand his answers (T. 4212). In order to support Pesut's testimony on this score, the defense called William Derbyshire, a linguistics expert in Slavic languages, particularly those spoken in the several republics of Yugoslavia, including Croatia.^{37/}

36/ (Continued from preceding page)

already knew was a sharp issue in the case concerning Pesut's non-comprehension of Derdak's language, Serbo-Croatian.

Shortly after the foregoing colloquy, even after the subject of Derdak's qualifications had been passed, the court interrupted and engaged Derdak in colloquy which established that Derdak's first language was Croatian, that he spoke it his entire life and that he belonged at one time to a Croatian club where Croatian was spoken. The court asked, "Nothing but?" and the witness said "Nothing but" (T. 4470-71).

Finally, apparently mindful that the jury might have the impression that Derdak's interrogation, which lasted four hours, could not have produced so little information as had been testified to by Derdak, except if there had been communication problems, the Court asked Derdak if Pesut had told him "a number of other things which do not really pertain." Derdak gave a lengthy response which added up to "Yes" and the court then reinforced the answer: "I just wanted to know. He spoke about a number of other things and subjects and it took time?" (T. 4487).

37/ Derbyshire had to be called as a defense rebuttal witness because the court would not allow his testimony during the main defense case, despite the entreaties of defense counsel (T. 4030-36). Eventually, after Derdak had testified, the court permitted Derbyshire to testify but warned counsel to "streamline" Derbyshire's testimony (T. 4832).

The court also refused to allow Derbyshire, who had interviewed Pesut over the course of many hours, to testify concerning Pesut's ability to speak or understand English (T. 4836). Counsel, in seeking to

(Footnote continued on next page)

Counsel for Pesut, after eliciting Derbyshire's rather impressive credentials as he had previously during the pretrial hearings (Joint App. at 266), then asked Derbyshire if "there is such a language as Serbo-Croatian" (T. 4971).^{38/} Government counsel made a general objection and the court said counsel "had better lay a foundation" (T. 4971).^{38a/} Obviously, perplexed, counsel pointed out that the assistant had made no such objection, but the court held to its ruling and proceeded to question Derbyshire at length. Eventually, the court elicited from Derbyshire that, in the judge's words "the Serbian language is somewhat similar to the Croatian language" (T. 4971-72). When counsel sought to regain his position as examiner, the court responded "...wait a minute. You couldn't lay a foundation yourself. I was trying to do it for you. I do not want you to

37/ (Continued from preceding page)

elicit that testimony from Derbyshire, sought to conteract the testimony of Hochstetler who testified that Pesut had said, at one point, as the aircraft was buzzed by a French jet fighter plane, "close the curtains" (T. 1804). Pesut's testimony was that he was just as scared as everybody else when the jet passed by, but that he gave no such order (T. 4183-84). Pesut's ability to speak English also figured prominently in the testimony of Gore and Bracaglia. They testified that the man who approached them in Grand Central Station spoke "broken English" (T. 2323, 2377). The court, however, refused to allow Derbyshire to give such testimony, viewing it as "prejudicial", apparently because it could be "completely contrary to what the evidence shows. It would be highly prejudicial and I believe there is no basis for it" (T. 4846). Government counsel agreed with the court's analysis (T. 4847) and the discussion then degenerated to the point where Judge Bartels accused defense counsel of trying to "sandbag" the court (T. 4848-51), even though it was counsel who had initially raised the question with the court the week before (T. 4327).

38/ At the pretrial hearing, the court found no fault with the foundation that counsel had laid; or, at least, if it did, said nothing about it and the same question was asked then without remark by the district judge (Joint App. at 270).

38a/ The day before, the assistant had said that he would stipulate to Derbyshire's qualifications (T. 4833).

interrupt". Counsel said he thought he had laid a foundation but the court shot back: "Do you understand the English language" and continued to ask several more questions (T. 4971-72; see also 4851).

When counsel was finally permitted to question his witness, it was established that the term Serbo-Croatian is used to describe generally the various dialects and variances spoken in Yugoslavia, but that Serbian and Croatian were separate languages, even though they were similar (T. 4973). Within the Croatian language there are three dialects; Pesut speaks the so-called "coastal" dialect (T. 4974-76).

Counsel asked Derbyshire whether, in his opinion as an expert, a person who spoke Serbian would be able to communicate with someone who spoke Croatian. The court, however, viewed this inquiry as improper. When counsel requested the opportunity to make an offer of proof, however, the court responded: "No, you will follow the rules...Why do I have so much trouble with you? Proceed. Please" (T. 4980). Shortly afterward, though, the court permitted the question (T. 4981), but only after it had already told the jury when it was first asked that "these are general statements which may be completely irrelevant to this case..." (T. 4980).^{39/} At another point in his testimony, Derbyshire testified that the foreign word Dardak has used to translate the word "silent" in "You have a right to remain silent", was a homonym which could mean either "silent" or "sense or feel" (T. 4986-87). But when counsel asked Derbyshire

^{39/} Later on, the court disallowed an inquiry of Derbyshire because, as the court stated "He made a general statement. You can't be specific" (T. 4995). In contrast, when Dardak testified "generally," the court made no comment (e.g., T. 4468).

which meaning would be ascribed by a person who "spoke the Coastal Croatian dialect" (T. 4987) the court sustained the objection - "Next question". (id) Having already been chastised, counsel did not seek to make an offer of proof. Thereafter, however, counsel asked an entirely different, though related question. This was the colloquy:

Q. Is the Croatian word for sense or feel, does it sound exactly the same as the word in the Serbian language for silent?

MR. SCHLAM: Objection.

THE COURT: Sustained.

Now I ruled on that before Mr. Rochman. You paid no attention to the ruling, but you proceeded to ask the same question as though the ruling had not been made. I will not let you do that again. I want you to keep that in mind." (T. 4990)

Derbyshire was also cross-examined by the court. After he testified that the communication between Derdak and Pesut must have been greatly hampered by the difference in their languages, Judge Bartels inquired "Could be, but you don't know that they actually were." Derbyshire said "No" (T. 5002). Of course, there was no confusion in the record as to whether Derbyshire was present at the interrogation. Yet, even when counsel said he was attempting to explore that very issue, that of their mutual understanding, the court responded, referring to Derbyshire's answer: "He said he couldn't know." Counsel's diplomatic request to be allowed to continue was met with: "You try. I will be here to listen" (T. 5002).

Counsel tried. He tried during the cross-examination by the assistant and the court,^{40/} but was met with the court's caustic

40/ During Derbyshire's cross-examination the court's questions and gratuitous comments totaled 47, and nearly every one of them aided the government's case or, at the least, showed the court's bias (See, e.g., T. 5016-17, 5019, 5023-24, 5026-27, 5035-36). None involved points of confusion.

responses: "Mr. Rochman, please, he has a right to cross-examine. Please sit down. The rest of this afternoon is not going to be a dialogue between you and me. It is overruled, sit down" (T. 5008); "Sit down. Overruled" (T. 5014); " ... overruled, please sit down ... " (T. 5019); "You know better than that. Sit down" (T. 5025). But the objections which were taken were proper. Thus, it was wrong for the court to interject and say to Derbyshire: "So you don't know all the complete picture here then, do you?" (T. 5036); or "that conclusion is based solely upon what he [Pesut] told you" (T. 5019). It was wrong for the court to comment to Derbyshire. " ... But you had no assurance or guarantee [as] to whether or not he did understand, Mr. Derbyshire? You had no assurance? Except the difference between the two languages" (T. 5017).

On redirect examination, however, the court continued to make comments which flatly signalled the jury that Derbyshire's testimony was worthless. Thus, when Derbyshire pointed out that the word "friend" as used in the 302 report on Pesut (" ... ZVONKO BUSIC, a Croatian friend of his [Pesut's] [Joint App. at 481]) came from a Croatian word which more probably meant "acquaintance", when used by Pesut. Judge Bartels commented: "This is simply an opinion of yours, no question about that" (T. 5056); (see also, T. 5057, 5059, 5060-61; 5067 and 5070).

9. The Summations

Prior to the summations, all sides agreed that there would be no interruptions by opposing counsel. Government counsel thereupon gave an opening summation which lasted five-and-a-half hours. No defense counsel interrupted nor, with one exception, did the court

see fit to interrupt even though government counsel, through hyperbole, at times, took extreme liberties with the evidence and went beyond the proper bounds of advocacy.^{41/}

In contrast, the court repeatedly interrupted the summations of counsel for Matanic and Pesut and, by those interruptions, encouraged government counsel to do likewise. The mere fact of those interruptions coupled with their often scathing denunciations of defense counsel served to severely prejudice the defendants. More importantly, these interruptions and comments were, at best, and in only a few instances, barely justified and, in most cases, wholly unwarranted and prejudicial.^{42/} The effect of this conduct by the court, by itself, would be sufficient to warrant a new trial, depriving as it did the right of the defendants to argue their defense to the jury. Coupled, however, with the bias of the court shown throughout the case, it serves to highlight what was an egregiously unfair trial. We set forth some but not all of the instances of that bias.

At one point, in dealing with Matanic's testimony concerning the confession he allegedly gave to Agent Davidheiser, the assistant argued to the jury that, in his testimony, Matanic had attempted not to directly contradict Davidheiser because, as the assistant argued, "Mr. Matanic knows in a credibility contest as far

^{41/} During the luncheon recess, in the middle of the government's summation, counsel for Mr. Busic, Mr. Tigar, attempted to speak with the court but was cut off in midsentence (T. 5401).

^{42/} Counsel for Pesut was interrupted more than a dozen times; counsel for Matanic more than 40 times. Government counsel was interrupted once in his summation (T. 5439), and then only to inquire if counsel was about to repeat himself.

as the jury is concerned - comes down to one between he and David Hiser [sic], who is the person that the jury is...going to think has more of a motive to lie? Agent David Hiser [sic] or Mr. Petar Matanic? So he doesn't dispute that he confessed to Agent David Hiser [sic]. No, he's not going to take that route because he, for sure, knows he comes out a loser in that contest." (T. 5406-07)

Of course, there was a serious credibility question between Matanic and Davidheiser because Matanic had denied that he had ever confessed. Counsel for Matanic, however, was never permitted to turn that argument on its head. Thus, when defense counsel started to urge the jury that "...it goes the opposite way. Agent Davidheiser knows that, too. He knows that nine times out of ten when he gets up there and he testifies against a defendant you're going to believe him--." Counsel was interrupted and the following colloquy took place.

MR. SCHLAM: Objection, nine times out of ten. Is that statistic in evidence, your Honor?

THE COURT: Sustained.

MR. BERGMAN: I respectfully except.

THE COURT: Sustained.

MR. BERGMAN: He knows as well as Petar Matanic may know, whatever the percentages may be.

MR. SCHLAM: I'll object to that statement, "whatever the percentages may be".

THE COURT: Mr. Bergman, I hate to interrupt and stop you, but unless you contain your summation within the bounds of propriety I will stop you. (T. 5667)

This argument, however, was a perfectly proper answer to the same argument made by the government, yet the court inexplicably prevented

it and, at the same time, by its comment on "propriety" could only have impressed the jury with its bias in favor of the government and against the defense.

Once again, with respect to Davidheiser, counsel for Matanic sought to make a twofold argument based upon Matanic's request for a lawyer to Assistant District Attorney Tanenbaum: (1) that the request of Tanenbaum impugned Davidheiser's testimony generally; and (2) that Matanic would not have requested a lawyer of Tanenbaum if, as Davidheiser had testified, he had already confessed (T. 5663-5665). The court, however, as it had done on so many other occasions, completely undercut the force of the argument by telling the jury that there was no evidence to justify the argument "and it's confusing to the jury. Let me make this plain to the jury what happened here" (T. 5665). The transcript continues:

"We are going to straighten things out. Davidheiser had interrogated Matanic first. He's a federal officer. He had finished, completely and his job was done.

Then Tannenbaum [sic], representing the State of New York came in and that was no concern of the Federal Government.

MR. BERGMAN: I respectfully except to that, your Honor because Agent Davidheiser --

THE COURT: You cannot make statements which leave that confusion and ambiguity up in the air."

Thus, not only did the court destroy a perfectly legitimate argument, it also gave the jury the impression that the defense was creating evidence when there was none and attempting to confuse the jury. ^{43/}

^{43/} At an earlier point, the court, for no appropriate reason, reprimanded counsel again: "Tanenbaum is not in the federal system, is not a representative of the United States Attorney's Office. Is that made clear, Mr. Bergman" (T. 5645)

The same combative stance by the court was shown once again when counsel for Matanic, in the course of urging that Basic was the "leader" and Matanic "really had no say", argued that Captain Carey "testified to that....Petar would go up to him [Basic], and Zvonko would say go away. I haven't time to talk to you" (T. 5621). Once again, without even an objection by the government, the court interrupted and told the jury that counsel was making a statement unsupported in the record (T. 5621-22). In fact, the argument was fully supported in the record (T. 1554, 1693). Once again, the jury was left with the impression that Matanic's defense was so paltry, that counsel had to resort to manufacturing evidence and was therefore arguing improperly. ^{44/}

44/ In contrast, statements and arguments by government counsel which were, in fact, unsupported in the record were never once corrected by the court and, because of the agreement concerning objections, went unfettered to the jury. Throughout his summation, the Assistant repeatedly staged conversations involving the defendants and the passengers or crew in such a way as to falsely portray them as venal or perverse people (see, e.g., T. 5292, 5294-96, 5297-99, 5300-01, 5312-15, 5318-19). The court did not interrupt, however.

Evidence was misstated but the court simply listened. For example, government counsel misstated the evidence when he argued that Julianne Basic "introduced" the hijackers to Thomas Van Dorn, the steward. With that false statement as a backdrop (which was corrected by the court [T. 5480]), counsel then staged the following non-existent scene:

"Now, Tom, Tom Van Dorn, this is Petar. He's a very nice fellow. Just behave yourself and everything will work out fine. This is Frane. He's going to be in the back now, holding the bomb. Don't worry. He's under control. This is Mark, Mark Vlasic, he's a very, very sweet fellow. And he'll be in the back, too, with Frane. Now, please don't be upset because everything is going to be all right." (T. 5297)

Aside from everything else wrong with it, Thomas Van Dorn had not even been a witness in the case. The Assistant argued that Matanic stood up before the announcement and that he had a tear gas gun in his pocket when, in fact, he did not (T. 5295) and that he intimidated the passengers with it when, in fact, none saw it (T. 5353). Moreover, the Assistant utterly distorted Matanic's testimony as to what Basic had said to him outside the cockpit (compare T. 5402 with T. 2949-50). The court, however, never interrupted. Finally, the Assistant improperly used Basic's confession as evidence against Matanic and Pesut. (*Infra*, at 57).

The same impression was created when counsel, in an effort to highlight the lack of prior association between the defendants, suggested to the jury that it "suppose" or "make believe" that the evidence, in fact, showed a very close association. By this time, of course, the agreement that there would be no interruptions by counsel was no longer recognized and the judge permitted government counsel to freely and needlessly object to the words "make believe". The court immediately responded "We can't have that" (T. 5605).

The court also refused to allow counsel to argue that one result of the process of political inculcation of Matanic by Basic was that it instilled in Matanic "a sense of guilt, a sense of shame --" which, in part, was responsible for Matanic's trust in Basic (T. 5593). The court refused to allow the argument altogether and told the jury that "There's no evidence to justify that argument" (id). In fact, the court refused to allow counsel for Matanic to recount the substance of Basic's statements to Matanic during the several meetings they had in the Spring and Summer of 1976: "Of course [speaking to counsel], you don't have anything specific on that except one meeting out in Astoria." (T. 5595).^{45/} Once again, that was a comment unprompted by any objection by the assistant.

Counsel for Matanic attempted to explain why Matanic had returned to the plane on two occasions when he had left, once in Iceland to bring food on board (T. 1574) and once in Paris to remove the sick passenger (T. 1625-26). This was a particularly crucial argument because the court had indicated that it would charge

^{45/} Of course, the evidence showed that there were several meetings at different places (T. 2914-21, 2965-73, 3830-33, 3835-39).

the jury that the defense of coercion could be defeated if the jury found that the defendant had "a reasonable opportunity to escape without committing the crime or without a reasonable opportunity to seek protection of the Government" (T. 5823-25).^{46/} To meet that instruction, as well as to further explain the particular factors involved in the coercion of Matanic, counsel urged the jury that Matanic had returned not out of fear for his own safety, but out of fear for the safety of the other passengers who might suffer at Busic's hands should Busic panic at Matanic's absence. In fact, Matanic had testified to as much (T. 3907, 3962). The court, however, simply refused to allow the argument and on its own, interrupted, stating that the argument was "pure speculation" (T. 5624) and "...I find no evidence at all that his presence was necessary on that plane to protect those passengers. There is no evidence of that" (T. 5625). Thus, in one fell swoop, the court annihilated a crucial defense argument; one which even the government had not seen fit to object to because it was a perfectly legitimate position to urge.^{47/}

There was yet another argument on behalf of Matanic which was derogated by the court. Both Matanic and Pesut had claimed that the testimony of the agents who had interrogated them should not be credited. Matanic claimed that Davidheiser, who attributed Matanic's prior knowledge of the hijacking to his attendance at the dinner meeting at the Top of the Park Restaurant, had simply used that meeting as

^{46/} The jury knew, among other things, that the United States Navy had a base at Keflavik, Iceland (T. 1600).

^{47/} The following day, the court told the jury that its interruption "was not justified" (T. 5685), and proceeded to tell the jury that it could consider the argument.

the skin in which to fill in what he claimed to have been Matanic's admissions of prior knowledge. (Pesut's claim was that he and Derdak simply did not speak the same language.) In both cases they urged the jury to believe that they had not confessed to their interrogators. Both also testified that nothing at all was said at the dinner table concerning a hijacking or even the secret meeting (T. 3861, 4079-80) and, in fact, Matanic called as one of his defense witnesses the person who waited on their table^{48/} to show that Davidheiser should not be believed.

In an effort to show the jury that Davidheiser had contrived something sinister out of the restaurant meeting, counsel urged the jury to consider that Pesut, who was at that meeting and who, on the government's theory, spoke freely to Derdak, had nothing whatsoever to say of an incriminating nature concerning the dinner (see testimony of Derdak, T. 4534, 4457, et seq; FBI 302 report on Pesut, Joint App. at 47). But the court stymied the argument. No sooner had the argument begun and counsel mentioned Pesut's name, that the court interrupted (without objection from the government or counsel for Pesut): "Wait a minute, this strikes me rather unusual. You represent Petar Matanic. Now, what is the message related to your

^{48/} Thomas Rakosi testified that the Top of the Park Restaurant catered to an international clientele (a fact, incidentally, which the court told the jury was irrelevant and "doesn't make any difference" (T. 3787) even though the defendants, who speak a foreign language, would not feel secure in such a restaurant if they were planning a hijacking). He was the waiter for the defendant's table on the evening of September 9, 1976. Rakosi did not observe any whispering, passing of papers or the like. They ate their dinner "like ordinary people. I didn't see anything special" (T. 3789).

defense" (T. 5657).^{49/} A short while later, as the argument was proceeding, the court remarked that there was no "evidence" that Pesut, in effect, had not told agents about the Top of the Park Restaurant. When counsel pleaded that "this is a very important point," the court responded "I know everything is important, Mr. Bergman. Nevertheless, just limit yourself to the defense of your own client" (T. 5659). And, though the argument was eventually made, the jury, which was somewhat numbed already by the nearly nine hours of summation it had already heard that day, had been alerted that counsel's argument was unsupported in the evidence and not worth listening to anyway.

The bias shown during the summation for Pesut -- who, along with Matanic, testified that he had been coerced by Basic -- was nearly as great as the bias shown against Matanic, although not shown as often.

Counsel for Pesut had told the jury, at the outset of his summation, that he was not going to appeal to their emotion (T. 5482). (And, as his summation shows, he never did.) But, when counsel urged the jury that the case was "important" and a "serious matter", the court jumped down his throat: "No. Just a minute. I thought you said we are not going to appeal to sympathy. Did you say that?" (T. 5483)

^{49/} Even though the court studiously delineated between counsel and their defendants at this point, it had earlier, in the testimonial portion of the case, insisted on characterizing the defense counsel cross-examination of defendants other than their own clients as "just a continuation of direct" (T. 2962, see also, T. 3953).

Counsel could only reply that he was just trying to tell the jury "the importance of the question they are to decide." (Id.)

The court's combativeness continued throughout the summation for Pesut. When counsel sought to deal with the false name on Pesut's airplane ticket, he reminded the jury that Pesut had carried in his wallet items showing his true identification. Apparently, ever mindful of defense overreaching, the court immediately asked: "Is that in evidence?" (T. 5498). Similarly, the court interrupted into oblivion a defense argument concerning the defendant's well-founded belief in the need for secrecy and, hence, the use of a false name and the implicit trust in Busic (T. 5493-95).

Just as counsel for Pesut was commencing his argument concerning the eyewitness' identification of Pesut, urging that eyewitness testimony is "notably fallible" where two parties are strangers, the court interrupted and said "I will give instructions on identification testimony"; and " ... you talked about it not being common and misidentification. There is no evidence on that" (T. 5516). Counsel for Pesut also attempted to make an argument that eyewitnesses tend to fill in details that may not have existed. In an about face, the court, which had viewed Dr. Buckhout's testimony as falling within the province of the jury, now refused to let counsel make that argument in summation. What had been viewed by the court as a matter of common understanding was now used against counsel who was caustically accused by the court of giving an "opinion"; "You haven't qualified yourself as an expert. It's not argument. You want me to explain why in the absence of the jury?" (T. 5536) Counsel

declined the invitation. (Id.) Finally, when counsel sought to argue that the photospread of the five defendants shown to each of the eyewitnesses was not a fair spread, the court so riddled the argument with needless interruptions as to virtually destroy its effectiveness and make counsel appear as if he was purposely misleading the jury (T. 5539-41).

Other needless interruptions were made during the course of the summation for Pesut (as had also been done to Matanic's counsel [T. 5575, 5577, 5581, 5583, 5591, 5648]). To show that Pesut was a dull person, counsel urged that he "smiles in inappropriate situations ... when he doesn't understand and when he does understand". This statement found clear support in the testimony of the last two witnesses of the trial, the two clothing salesmen who had sold Pesut clothing (T. 5134, 5141). Nevertheless, despite its support in the record, the court -- having forgotten the testimony -- pressed counsel on whether there was evidence in the case or, asked counsel derisively if it was just his "opinion" (T. 5559). Other unduly harsh and unnecessary reprimands followed (e.g. T. 5564, 5569). Counsel's simple statement that Pesut was not a political radical was met with the court's immediate chastisement: "You can't -- there is no testimony to that effect" ... "proceed with the proper argument" (T. 5570).

POINT I

THE DISTRICT COURT'S UNRELENTING
BIAS AND HOSTILITY PERMEATED THE
TRIAL FROM START TO FINISH AND
DEPRIVED APPELLANTS OF A FAIR TRIAL

Neither appellants nor their counsel relish the need of having to challenge the trial conduct of Judge John R. Bartels. Nobody does. That Judge Bartels is a Senior Judge who has sat for many years does not make this any easier. But, the simple incapable fact is, Judge Bartels did not conduct this trial with even a semblance of fairness.

The judge did not come close to the even-handedness require by our system. In every conceivable way, from the beginning of the trial to the end, and at every turn, the judge, in perfect symphony with the government, conveyed to the jury his personal certainty that Matanic and Pesut were guilty.

a. Judge and Prosecution Became a Team

The judge and the government became a team. He gave the Assistant United States Attorney enormous latitude. When the government and its witnesses were treading water, he spontaneously came to their rescue. When the defense and its witnesses had valid points to make, he quickly either cut them off, or conducted his own cross-examination, or derided their importance, all usually accompanied by caustic remarks belittling defense counsel. In plain and simple language, Judge Bartels' conduct poisoned the trial and prevented it from being fair.

The leading case in this Circuit pertinent to the conduct of a trial judge in a criminal case is probably United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973). See also, United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); United States v. Guglielmini, 384 F.2d 602 (2d Cir. 1967); United States v. DeSisto, 289 F.2d 833 (2d Cir. 1961); United States v. Brandt, 196 F.2d 653 (2d Cir. 1952). In Nazzaro, the court stated (472 F.2d at 303):

[A] judge's participation during trial - whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct - must never reach the point at which it appears to the jury that the Court believes the accused is guilty.

Stating the rule is easier than applying it. District judges are not perfect, and occasionally mistakes are made. Some are sporadic (e.g., United States v. Cuevas, 510 F.2d 848 (2d Cir. 1975)), others perfectly understandable, and many more probably provoked by counsel. It is well appreciated that such errors do not automatically, or necessarily, mean a trial was unfair and a reversal mandated. There comes a time, however, as noted in Nazzaro, that the line is crossed. Judge Bartels exceeded that line here, even more clearly than the trial judge in Nazzaro.

We are not concerned here with insignificant incidents or isolated comments. Throughout the course of this case, Judge Bartels exhibited to the jury his unrelenting bias in favor of the government case and his unprovoked disdain for the defendants, their counsel and their case. Nor did the judge's feelings flare

up and down. He carried on a persistent drum beat against the defense, culminating in an egregious intrusion into the summation arguments.

Yet no matter what the trial judge thought, there is no mistake about one thing: this was a close case. It took six weeks to try, required 49 witnesses, and had the jury out for three days. The case was thoroughly prepared. The defense case of Matanic and Pesut brought into issue very sharp credibility contests as well as important inferences from the circumstantial evidence. The contrasting testimony between the interrogating agents (Davidheiser and Derdak) and Matanic and Pesut was critical. And, whether Matanic's and Pesut's conduct before and during the hijacking, as told by the passengers and other witnesses, was, or was not, consistent with their version of events, presented hotly contested and crucial questions. There were the close and difficult issues that the jury had to fairly and open-mindedly decide. But, the overwhelming bias of Judge Bartels disintegrated this balance. The transcript, upon review, leaves no doubt about this.

b. The Court destroys the Presentation of Summations

It goes without saying that effective summation is of extraordinary importance to the defense, which then gets its only real opportunity to put all the pieces in place. Judge Bartels made a shambles of counsels' summations on behalf of Matanic and Pesut. Knowing the ground rules of no interruptions, which the government was given the benefit of, the judge and eventually the prosecutor, with the court's imprimatur (T. 5648), proceeded to

interrupt the Matanic summation more than 40 times and the summation for Pesut more than a dozen times. This was improper, was not equal treatment, and, regrettably, cannot be overlooked.

Moreover, the court's supervision of the summations was doubly biased. Not only were the defense summations cut to ribbons;^{50/} the government's summation was permitted to go unfettered to the jury despite its impropriety and despite this court's repeated cautioning against such misconduct. See, e.g., United States v. White, 486 F.2d 204 (2d Cir. 1973), cert. denied 415 U.S. 980 (1974); United States v. Bivona, 487 F.2d 443 (2d Cir. 1973).

Under the court's supervision, government counsel was permitted to argue that Matanic carried the tear gas gun up and down the aisles, despite the fact that there was no evidence of that at all (T. 5295-96, 5353, 5416). The assistant argued that Matanic had admitted to a passenger that he had helped carry the fake explosives through the security system (T. 5359), when in fact, the ultimately clarified testimony of Noreen Collins (T. 4817-18) did not amount to that at all. Counsel for the government ridiculed Matanic's testimony as "rehearsed" (T. 5404); that he was part of a "four way fooling process" (T. 5405); that Matanic was trying to "fool" the jury and continue a "hoax" that began on the plane (T. 5405-06); and that the jury was being asked to "swallow" (T. 5407) "Mr. Matanic's whole act" (T. 5409). He ascribed to Matanic "the unmitigated gall in trying to tell you something that's diametrically, 180 degrees different from what really happened" (T. 5415-16).

^{50/} Infra, at 42-52.

Pesut, who the assistant sarcastically referred to as "this poor chap" (T. 5416) or "poor Mr. Pesut" (T. 5419) fared no better under the court's non-supervision. Pesut was also portrayed as having planned his testimony ("some stuff") with his codefendants in advance of trial (T. 5426). On one aspect of Pesut's testimony, the assistant argued: "That's his explanation to you. That's what you call trying to slip and slide" (T. 5427).

Finally, and once again under the court's supervision, the assistant made use of Basic's statements to Agent Strand in such a way as to suggest to the jury, improperly, that Basic's statements were evidence against Matanic and Pesut (see, e.g., T. 5355-57, 5445, 5754).

c. The Exclusion of Testimony

We have set forth in the statement of facts the numerous instances where the court either derided or curtailed defense evidence. But there were other instances where the court was called upon to exercise its discretion concerning significant blocks of evidence. In every instance, the court exercised its discretion in favor of the government's position.

Thus, the court excluded Dr. Diamond's testimony despite not only its importance to Zvonko Basic's defense (see Brief for Basic, Point II) but to Matanic and Pesut as well. Dr. Diamond would have buttressed their testimony that Basic, a secretive person, had not told them of the hijacking in advance (see footnote 9a, infra).

Similarly, the court refused to exercise its discretion in favor of permitting Dr. Buckhout to testify concerning the dangers of eyewitness identification. However, similar testimony has been permitted by government photographic identification experts, see United States v. Fernandez, 480 F.2d 726, 740 (2d Cir. 1973) (Friendly, J.) and is certainly allowable under Rule 702 of the Federal Rules of Evidence.

Finally, the court's refusal to permit Derbyshire to testify concerning Pesut's inability to speak English (see footnote 37, infra) was yet another instance of the court's apparently conscious approach that, because it had broad discretion in these matters it could, therefore, safely prevent the jury from hearing that evidence.^{51/} We respectfully submit that, on the entire record of this case, it cannot be said that those decisions were the product of an impartial arbiter.

^{51/}The court, quite clearly intended to go as far as it could go without a reversal. Thus, before one days' recess, when counsel for Busic objected to a government rebuttal witness who would be repeating, essentially, the testimony of a government witness heard on the government's direct case, the court stated:

"Aren't you super-technical? Do you think if I let Mr. Schlam bring in testimony such as he now purports to bring in, there's any possibility if your client gets convicted of I being reversed on that? If you think so, give him the cases. I don't think there's a chance in a hundred and unless your cases are exactly on point, he's going to be able to bring it in.

Good night." (T. 4402)

While the court probably intended to carry its bias to the very line separating reversal from affirmance, appellants submit that the court misjudged and transgressed that line.

d. Biased Charge on Circumstantial Evidence

In line with its onesided view of the case, the court charged the jury that the government could prove its case based upon circumstantial evidence (Joint App. at 633-636, T. 5833-5836), but refused to advise the jury that the defendants, as well, relied upon circumstantial evidence in their defense and that, therefore, the jury could acquit based upon the circumstantial evidence (T. 5877).^{52/} This was clearly error. United States v.

52/Specifically the court treated the request as follows:

MR. BERGMAN: On circumstantial evidence, Your Honor, page 52.

THE COURT: Yes?

MR. BERGMAN: I object to the characterization which begins that charge as speaking about the government's case.

THE COURT: All right. Overruled. What's your next?

MR. BERGMAN: What I would suggest to the Court, Your Honor, is that you speak also of the defense case rests on circumstantial --

THE COURT: Overruled.
Some of your objections have been frivolous and time-wasting and I don't know that I'm --

MR. BERGMAN: I request that the Court advise the jury --

THE COURT: I'm not interested in any more of your objections. (T. 5877)

* * * * *

Eddings, 478 F.2d 67, 73 (6th Cir. 1973). While such error, standing alone, may not require a reversal, it stands as yet another instance of the district court's adamant bias in favor of the government.

It is futile to review here again all the instances of the judge's misconduct -- there are just too many. In our factual presentation we have given a number of instances of bias and hostility which persisted throughout the trial. The entire trial transcript is replete with the judge's bias.

"A claim of unfair judicial conduct, under these circumstances, requires a close scrutiny of each tile in the mosaic of the trial so that we can determine whether instances of improper behavior or bias, when considered individually or taken together as a whole, may have reached that point where we can make a safe judgment that the defendant was deprived of the fair trial to which he is entitled. ...On the record before us, we are left with the inescapable conclusion that the judge's conduct during trial seriously prejudiced the defendant." United States v. Nazzaro, 472 F.2d at 304.

The conduct of Judge Bartels, in numerous individual instances and taken as a whole, leads to the inescapable conclusion that the judge's conduct seriously prejudiced Matanic and Pesut and deprived them of a fair trial.

POINT II

THE COURT ERRED IN NOT DIRECTING
THE GOVERNMENT TO DISCLOSE TO THE
DEFENSE THE FBI 302 REPORTS OF
THE PASSENGERS

The defendants had requested, at the outset of the prosecution, to be provided with the statements of the passengers to the FBI (see, e.g., Joint App. at 123-128). In addition, at the pretrial conference held on February 24, a month before the trial began, counsel reiterated the request, arguing that those reports (loosely referred to as "FBI 302 reports") would disclose that the conduct (or, non-conduct) of the defendants Matanic, Pesut and Julianne Basic on board the plane was consistent with their claims that they lacked knowledge and intent (Joint App. at 205-08, 218-20, 225).^{53/}

At first, the court appeared inclined to direct that the government turn over all those reports: "Let's not play games. Give them all to everybody" (Joint App. at 229). After further deliberation, however, the court ruled against the request in a formal decision in which, though it implicitly recognized that the request was well-founded, nevertheless shunted off to the government the sole responsibility of determining what was and was not exculpatory. (Joint App. at 245-246).^{54/}

^{53/}Although many of the passengers were eventually interviewed by the defendants' counsel or investigators, these interviews, necessarily, were conducted some time after the hijacking and not immediately afterwards as had been the case with the FBI interviews.

^{54/}During the course of the trial, when the request was advanced again, the court stated: "I instructed the Government to give you the Brady material and if you read the cases, they are pretty strong in saying it is up to the Government to decide whether it is or isn't Brady material and not the defense." (T. 3243)

This Court, however, in United States v. Hilton, 521 F.2d 164, 166 (2d Cir. 1975), cert. denied, 425 U.S. 939 (1976) held that, "...it is the policy of the court that it, and not the United States Attorney's Office, will rule on the materiality of evidence which may be only marginally useful to the defense." The Hilton decision was brought to the court's attention. But, the trial court gave it and counsel short shrift (T. 3253) and repeatedly refused to direct that the reports be turned over. Thus, despite the government's constant assurances that it had found no exculpatory material in the 302 reports (T. 3247, 3368, 3502-3), the record in this case leave substantial doubt that the government fulfilled that responsibility.^{55/}

To this day there is no assurance that the government does not have in its files reports of first class passengers who saw that Matanic stood only after the announcement. Of course, such evidence would strongly detract from the argument of the government -- an argument that was essential to the prosecution -- that Matanic was "poised" (T. 5295) before the announcement.

Similarly, there is no assurance that the government's files do not contain reports of passengers who would dispute Mr. Hochstetler's testimony that Pesut was heard to say, in English, "close the curtains" (T. 1804). Nor is there any assurance that the two passengers who were present when Hochstetler spoke with

^{55/}It was entirely by accident, therefore, that the defendant Matanic came across the 302 report of Peter W. Plumley, a first class passenger who first saw Matanic in a standing position after the announcement was made by Captain Carey (T. 4029). Plumley's 302 report came to light when, after much prodding, the government gave it, along with two others (Berke Fenster and William Knudsen) to the court for its review as to Julianne Busic, but not Matanic (T. 3503).

Matanic would not recall their conversation in a manner at variance with Hochstetler's recollection.^{56/} There is no assurance, likewise, that the other passengers, in contrast to Hochstetler, observed Vlastic in the aisle of the coach section, rather than Matanic, as the plane headed to Montreal.

There is simply no sound reason for the government's refusal (and the court's steadfast support of that refusal) to turn over the 302's. Matanic and Pesut both claimed that they lacked prior knowledge and were coerced. Their entire conduct on board the plane (what they did and did not do) was clearly relevant and material to those issues. And, while Matanic may not have told any of the passengers that he did not know of the hijacking beforehand, he did speak with them in an ambiguous manner concerning his knowledge and participation. (Pesut, of course, said nothing to the passengers.)

What Matanic said was relevant and material. The court, however, viewed these requests as frivolous, satisfied, apparently, by its belief that there was enough inculpatory evidence of the

^{56/}Hochstetler had testified that in one of the conversations Matanic had said that "he was not doing it for himself, but he was doing it for the cause" (T. 1803). On its face, the statement was ambiguous; but the court, aside from refusing Matanic the opportunity of explaining it (T. 3925), also refused the defense request for production of the 302 reports of the passengers seated next to Hochstetler and who, presumably, would have overheard the conversation (T. 1984-7). Indeed, as the trial wore on, the court even refused to direct the government to turn over, as 3500 material, the FBI 302 reports of passengers who had testified for various defendants; these witnesses had, in turn, been cross-examined by the government with the widest possible latitude from the court, such that it would amount to direct examination under Rule 611(b), Federal Rules of Evidence (T. 3289-3294 [Basia Reeves]; 3497-98. [Walter Rush]).

defendants' conduct that nothing else could possibly tend to support their defenses concerning knowledge and coercion.^{57/} It was under this narrow view that the government conducted its unilateral review of the 302 reports. Under these circumstances, this Court should remand the case to the district court for the purpose of finally disclosing those reports, which are easily identifiable, to the defense.

57/This is an illustrative colloquy:

"THE COURT: Wait a minute, Mr. Bergman. Your problem is what they [the government] claim to be exculpatory, and what you claim to be exculpatory is entirely different.

They [speaking of the defense] claim any failure of passengers to see, let's suppose any guns or devices on these defendants exculpatory material.

MR. SCHLAM: I just don't understand that.

THE COURT: Of course, I don't either and I believe they don't understand it. If they understand it, I am ruling against them on that. Let there be no doubt about that. It seems to be perfectly frivolous to take the time of the Court with those applications.

MR. BERGMAN: Mr. Schlam took the time of the Court to show they did have weapons.

THE COURT: That's his proof.

MR. BERGMAN: How about the defendant's case?

THE COURT: No, negative proof. Please sit down. Let's proceed." (T. 3352)

POINT III

THE UNEXPLAINED AND MECHANICAL
IMPOSITION OF THIRTY YEAR SEN-
TENCES ON MATANIC AND PESUT WAS
UNQUESTIONABLY ERROR

At the outset, we wish to make clear that the sentences of Matanic and Pesut are not being challenged as being "excessive". Both sentences were within the statutory limit. 49 U.S.C. §1472(i)(1)(A). Nevertheless, it is clear that a manifest injustice has been done.

That injustice stemmed from the court's mechanical approach to the sentencing and its clear misconception of the jury's verdict. Both Matanic and Pesut were acquitted of the most serious charge in the indictment, hijacking resulting in death. But, despite the jury's unanimous acquittal on that Count, Matanic and Pesut inexplicably received the same sentence as Zvonko Basic, and more than Julianne Buic, who were both convicted of the most serious Count.^{58/}

A trial judge must fashion his sentence in accordance with established judicial constraints. Specifically, a judge's sentencing policy must rest upon "individualizing sentences".

^{58/}The codefendants Zvonko and Julianne Basic were convicted of all counts and received the mandatory minimum sentence of life imprisonment under Count I. In practical effect, however, the sentences of all the defendants (including Marc Vlasic, a fifth defendant who pleaded guilty to Count II and who received a 30 year prison term) were the same because Matanic and Pesut will not become eligible for parole until after 10 years, the same time when Zvonko Basic will also become eligible under 18 U.S.C. §4205(a). (Julianne Basic effectively received a lesser sentence because she will become eligible for parole after 8 years, pursuant to the direction of the court under 18 U.S.C. §4205(b)(1).)

Williams v. New York, 337 U.S. 241, 248 (1949); accord: United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974). A mechanical approach to sentencing is impermissible. United States v. Hartford, 489 F.2d 652, 655 (5th Cir. 1974).

Furthermore, while appellate modification of a sentence imposed by a trial judge involves an evaluation of the exercise of discretion, sentence modification "is an entirely different matter than the careful scrutinizing of the judicial process by which the particular punishment was determined." United States v. Hartford, supra, 489 F.2d at 654. This latter evaluation is not an intrusion into the exercise by a trial court of power to impose sentence. Id.

Here, it is clear from the record that Judge Bartels mechanically applied, in effect, a thirty year sentencing rule to each of the defendants including Matanic and Pesut. This mechanical imposition of sentence cannot be sustained.

Following the imposition of sentence, counsel for Matanic and Pesut each inquired of the court as to its reasons for giving, in practical effect, the same sentence it had imposed on Zvonko Busic, even though the jury had, by its verdict, so clearly differentiated the guilt of the defendants (ST. 64, 70).^{59/} Counsel was immediately berated for "holding up the whole sentencing process" (ST. 65) and the court refused to assign any reasons, other than to say that he had already given the reason

^{59/}Numbers in parenthesis preceded by "ST" refer to pages in the sentencing transcript of July 21, 1977.

the day before that the Busics' sentencing (ST. 66), and that he could have imposed a sentence considerably in excess of 30 years (ST. 70). Thereafter, government counsel opined that the disparity was not "terribly great", and that, in any event, the acquittal on Count I was due to "an erroneous instruction" of the court (ST. 73).

Then, in an extraordinary departure from its prior statements that day, the court stated:

"All of you are acting -- all of you are talking about the verdict of the jury as though you had a unanimous verdict which excused all the other defendants of count 1. You did have it, but I do not know. You went up and rushed to the jury immediately thereafter that night to find out how they stood." (ST. 74)

Taking the invitation, government counsel then speculated that the jury had originally been prepared to convict Matanic and Pesut of the first count but there was a holdout juror (ST. 74). When counsel for Pesut expressed his amazement at what was being said by the court and government counsel (ST. 75), the court responded: "You heard everything you heard. That is all I can tell you. I wouldn't be troubled by it. Why argue? Aren't you taking my time up with silliness?" (ST. 75). The court never did explain its reasons for imposing the same sentence on Matanic and Pesut as it had on Zvonko Basic.

The failure to explain the reasons for this disparity in sentencing (i.e., that the two defendants acquitted of the most serious Count -- Count I -- were sentenced as if found guilty on that Count) is crucial. As this Court recognized in McGee v. United States, 465 F.2d 357, 358 (2d Cir. 1972), when a

sentence imposed for a less serious count equals that of a more serious one as to which there is no conviction, the trial judge must give a more than perfunctory statement for his reasons for the sentence. Absent a justification for the sentencing disparity, an appellate court will either correct the sentence itself, United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960), or remand the case for a statement of reasons, see McGee v. United States, 462 F.2d 243, 237 (2d Cir. 1972).

Here, Judge Bartels did not even provide a perfunctory statement of justification for his sentencing of Matanic and Pesut. His approach was merely mechanical. And, as a result, the sentences cannot be affirmed.^{60/}

^{60/}Appellants Matanic and Pesut adopt the argument advanced in Point III of the brief for Appellants Zvonko and Julianne Basic captioned "The District Judge Erred in Denying Appellants Their Right to a Charge on a Lesser Included Offense."

CONCLUSION

The judgments of conviction should be reversed and a new trial ordered; in the alternative, the Court should remand this case to the district court for the reasons and purposes set forth in Points II and III.

Dated: October 3, 1977
New York, New York

Respectfully submitted,

FORD MARRIN ESPOSITO WITMEYER
& BERGMAN
Cunard Building
25 Broadway
New York, New York 10004
(212)269-4900

Attorneys for Defendants-Appellants
Petar Matanic and Frane Pesut

Of Counsel:

Paul B. Bergman

RECEIVED
U.S. ATTORNEY

OCT 7 12 02 AM '77

EAST. DIST. N. Y.

*Paul
G. Moore*

10/6/77

*Rec'd
WMB
W*